

**McNAIR & SANFORD, P.A.**

ATTORNEYS AND COUNSELORS AT LAW

MADISON OFFICE BUILDING/SUITE 400  
1155 FIFTEENTH STREET, NORTHWEST  
WASHINGTON, DC 20005

TELEPHONE 202/659-3900  
FACSIMILE 202/659-5763

CHARLESTON OFFICE  
140 EAST BAY STREET  
POST OFFICE BOX 1431  
CHARLESTON, SC 29402  
TELEPHONE 803/723-7831  
FACSIMILE 803/722-3227

COLUMBIA OFFICE  
NATIONSBANK TOWER  
1301 GERVAIS STREET  
POST OFFICE BOX 11390  
COLUMBIA, SC 29211  
TELEPHONE 803/799-9800  
FACSIMILE 803/799-9804

GEORGETOWN OFFICE  
121 SCREVEN STREET  
POST OFFICE DRAWER 418  
GEORGETOWN, SC 29442  
TELEPHONE 803/546-8102  
FACSIMILE 803/546-8093

GREENVILLE OFFICE  
NATIONSBANK PLAZA  
SUITE 601  
7 NORTH LAURENS STREET  
GREENVILLE, SC 29601  
TELEPHONE 803/271-4940  
FACSIMILE 803/271-4015

RALEIGH OFFICE  
RALEIGH FEDERAL BUILDING  
ONE EXCHANGE PLAZA  
SUITE 810  
POST OFFICE BOX 2447  
RALEIGH, NC 27602  
TELEPHONE 919/890-4190  
FACSIMILE 919/890-4190

SPARTANBURG OFFICE  
SPARTAN CENTRE/SUITE 306  
101 WEST ST. JOHN STREET  
POST OFFICE BOX 5137  
SPARTANBURG, SC 29304  
TELEPHONE 803/542-1300  
FACSIMILE 803/542-0705

January 4, 1994

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Consolidated Replies to Exceptions."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

John W. Hunter

By: 

Stephen T. Yelverton

Enclosure

B:CATON.123

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**B: CATON. 123**

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## CONSOLIDATED REPLIES TO EXCEPTIONS

### Introduction

1. Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.277 (c) of the Commission's Rules, hereby submits its consolidated replies to the exceptions to Initial Decision ("I.D.") filed by Shellee F. Davis ("Davis") and ASF Broadcasting Corp. ("ASF"). In reply to the exceptions, ORA submits the following comments.

### Replies to Shellee F. Davis

2. Davis, in her exceptions, at paras. 22-24, contends that ORA should not have been awarded a comparative signal coverage advantage based upon its provision of new nighttime service to under-served areas. However, Davis relies upon cases which are inapposite and factually distinguishable. In those cases, only a new 5th service would be provided, there were off-setting coverage preferences, all the applicants would provide some new nighttime service to under-served areas, or there was new service to a smaller number of persons than would be provided by ORA.

3. In the instant case, both a new 4th and 5th nighttime service to 2,434 persons would be provided by ORA. Davis would provide no new nighttime service to under-served areas and would not be entitled to any off-setting coverage preference. Davis proposed findings, at paras. 48-49.

4. Davis' reliance upon Barry Skidelsky, 7 FCC Rcd 1, 11, n. 15 (Rev. Bd. 1992), is woefully misplaced. There, the provision of a new 3rd nighttime service to 912 persons was decisionally insignificant because another applicant would provide a new 2nd nighttime service to 2,834 persons. Id., 10, para. 48. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49.

5. Davis' reliance upon Mark L. Wodlinger, 58 RR2d 1006, 1013-1014 (Rev. Bd. 1984) is also woefully misplaced. No preference was given for the provision of a new 5th nighttime service because another applicant would provide a new 4th nighttime service to a greater number of persons. Thus, the advantages were off-setting. Id., 1013-1014, para. 21. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49.

6. Davis conveniently ignores the holding of Mark L. Wodlinger, 1013-1014, paras. 20-21, that coverage preferences are awarded for substantial differences in the provision of 3rd, 4th, and even 5th new nighttime services. See also, Metro Broadcasting, Inc., 57 RR2d 440, 449, para. 18 (Rev. Bd. 1984); Christian Broadcasting of the Midlands, Inc., 57 RR2d 87, 91-92, para. 9 (Rev. Bd. 1984); Radio Jonesboro, Inc., 55 RR2d 991, 996-997, paras. 12-13 (Rev. Bd. 1984). In the instant case, ORA would provide new nighttime service to a total of 2,434 persons. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49. Accordingly, this is a substantial difference warranting a preference for ORA. See, WFSP, Inc., 56 RR2d 1449, 1450, para. 3, (Rev. Bd. 1984); Houston Family TV Ltd., 58 RR2d 1557, 1564, n. 10 (Rev. Bd. 1985).

7. Davis, in her exceptions, at para. 22, misstates Commission policy by suggesting that new nighttime service provided by an applicant is considered substantial or insubstantial based upon the percentage of the new nighttime service to the overall service provided by that applicant. However, the correct analysis is the percentage difference between the applicants in the provision of new nighttime service. Radio Jonesboro, Inc., 997, para. 13, difference between the applicants of only 7.5% in new nighttime service is considered substantial difference warranting a preference. In the instant case, ORA's advantage in the provision of new nighttime service is 2,434%. This is unquestionably a substantial difference between the coverage proposals of the other applicants and therefore warrants a preference for ORA.

8. Davis also erroneously relies upon Initial Decisions by ALJ's where the Review Board and the Commission apparently did not affirm that part of the decision dealing with signal coverage. Accordingly these cases have no precedential value. The Mass Media Bureau, in its proposed conclusions of law, at para. 1, correctly cites controlling Commission precedent as to this matter. See, Northern Sun Corp., 100 FCC2d 889, 894, paras. 9-10 (Rev. Bd. 1984), very slight coverage preference awarded for provision of new nighttime service to

under-served areas.

9. ORA's provision of new nighttime coverage, however slight, is of decisional significance. Because Davis and the other applicants in this proceeding are now not entitled to integration credit, pursuant to Bechtel v. FCC, Case No. 92-1378, decided December 17, 1993, signal coverage becomes the deciding factor. Although ORA would provide new nighttime service to only 2,434 persons, this is nevertheless a clear-cut difference in the proposals of the competing applicants. The other applicants would provide no new nighttime service to under-served areas. In close comparative cases, even small differences can tilt the decision.

Replies to ASF Broadcasting Corp.

10. ASF, in its exceptions, at p. 13, contends that ORA's challenge to the Commission's integration criteria comes too late. However, it offers no explanation or argument for this curious contention. Indeed, ORA stated its intention to challenge the Commission's integration policy from the beginning of this proceeding. See, ORA's integration statement, filed May 10, 1993. Accordingly, ASF's contentions are patently erroneous. ORA's challenge is timely and now must be credited pursuant to Bechtel v. FCC.

11. ASF further asserts that ORA's owners apparently have no broadcast experience. However, this assertion is not supported by the record evidence and is, in any event, legally irrelevant.

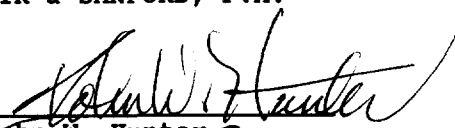
Conclusion

12. Based upon the record evidence and upon Commission precedent, ORA is entitled to a decisionally significant signal coverage preference over the other applicants because of its provision of new nighttime service to under-served areas. This signal coverage preference is determinative in view of the inapplicability of the Commission's integration policy.

WHEREFORE, in view of the foregoing, the Review Board is requested to vacate the I.D. in this proceeding and to grant the application of ORA because of its superior engineering proposal.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:   
John W. Hunter

By:   
Stephen T. Yelverton

January 4, 1994

020970.00001 ORA.144



**CERTIFICATE OF SERVICE**

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 4th day of January, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Consolidated Replies to Exceptions" to the following:

Joseph A. Marino, Chairman\*  
Review Board  
Federal Communications Commission  
Room 211  
2000 L Street, N.W.  
Washington, D.C. 20554


James Shook, Esquire  
Hearing Branch  
Federal Communications Commission  
Room 7212  
2025 M Street, N.W.  
Washington, D.C. 20554

Arthur V. Belenduik, Esquire  
Smithwick & Belenduik, P.C.  
1990 M Street, N.W.  
Suite 510  
Washington, D.C. 20036  
Counsel for David A. Ringer

James A. Koerner, Esquire  
Baraff, Koerner, Olender & Hochberg, P.C.  
5335 Wisconsin Avenue, N.W.  
Suite 300  
Washington, D.C. 20015-2003  
Counsel for ASF Broadcasting Corp.

Eric S. Kravetz, Esquire  
Brown, Finn & Nietert, Chartered  
1920 N Street, N.W.  
Suite 660  
Washington, D.C. 20036  
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire  
Law Office of Dan J. Alpert  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Counsel for Shellee F. Davis

  
Stephen T. Yelverton

\*Hand Delivery